Oct. 21st 1869.

Affirmed by divided Court.

Field J.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 174.

HENRY DOUGLASS, PLAINTIFF IN ERROR,

vs.

WILLIAM DOUGLASS, ADMINISTRATOR OF JOHN DOUGLAS.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 6, 1867.

SUPREME COURT OF THE UNITED STATES.

No. 174.

HENRY DOUGLASS, PLAINTIFF IN ERROR,

vs.

WILLIAM DOUGLASS, ADMINISTRATOR OF JOHN DOUGLAS.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate	2	1
Declaration	2	2
Bond	3	2
Writ of replevin	5	3
Plea	9	5
Issue joined	9	5
Defendant's bond for repossession	9	5
Jury empannelled	12	6
Verdict	12	6
Motion for new trial	13	6
Motion in arrest of judgment	14	7
Bill of exceptions	15	7
Final judgment	21	10

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the Supreme Court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea, which is in the said court before you, between William Douglass, administrator of John Douglass, plaintiff, and Henry Douglass, defendant, No. 1150, at law, a manifest error hath happened, to the great damage of the said Henry Douglass, as by his complaint appears: and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States, should be done.

Witness the Honorable S. P. Chase, Chief Justice of the United States, this 15th day of June, in the year of our Lord 1867, and of the independence of the United States the 91st.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To WILLIAM DOUGLASS, adm'r of John Douglass:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the District of Columbia, wherein Henry Douglass is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness David K. Cartter, chief justice of the said Supreme Court of the District of Columbia.

D. R. CARTTER,
Chief Justice.

Service acknowledged June 15, 1867.

WALKER S. COX,
Of Counsel for Def't in Error.

2 DISTRICT OF COLUMBIA, *to wit:*

I, Return J. Meigs, clerk of the Supreme Court of the District of Columbia, certify that originals, of which the following writings are true copies, are on file and of record in my office, and that said originals together constitute the record of the proceedings of said

court in the cause mentioned in the foregoing writ of error, to wit, entitled—

WILLIAM DOUGLASS, administrator of John Douglass, pl'ff,
v.
HENRY DOUGLASS, defendant.
} At law.—No. 1150.

Witness my hand and the seal of said court, June 15, 1867.
[SEAL.] R. J. MEIGS, *Clerk.*

In the Supreme Court of the District of Columbia, the first day of August, 1864.

Declaration filed Aug. 1st, 1864.

WILLIAM DOUGLASS, ADMINISTRATOR OF JOHN Douglass, pl'ff,
vs.
HENRY DOUGLASS, defendants.
} At law.—No.

3 The plaintiff sues the defendent for taking his, said plaintiff's, goods and chattels, and unjustly detaining them, to wit: About one hundred and thirty-five japonicas, four cape jessamines, one pittisporum, on square numbered ninety-one, in the city of Washington, in the District of Columbia, of the value of five thousand dollars; and the plaintiff claims ten thousand dollars.

EDW'D SWAN,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the first special term of the court, occurring twenty days after service hereof; otherwise judgment.

EDW'D SWAN,
Attorney for Plaintiff.

Bond filed Aug. 1, 1864.

Know all men by these presents that we, William Douglas, John Douglas, and Columbus Alexander, are held and firmly bound unto Henry Douglas in the full and just sum of eleven thousand dollars, to be paid to the said Henry Douglas, his certain attorney,
4 executors, administrators, and assigns, to which payment, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this first day of August, A. D. 1864.

Whereas the above bounden William Douglas, administrator of John Douglas, deceased, is about to sue forth out of the Supreme Court of the District of Columbia a writ of replevin, to be directed to the marshal of the District atoresaid, commanding him to replevy certain plants, being about one hundred and thirty-five japonicas, four cape jessamines, and one pittisporum, one square 91, in Wash-

ington city, the property of said William Douglas, as administrator of John Douglas, deceased, which the said Henry Douglas hath taken and unjustly detains, &c. Now, the condition of the above obligation is such, that if the said William Douglas, as aforesaid, do and shall well and truly prosecute the said writ with effect, and also shall and will return the goods and chattles aforesaid, if the same be adjudged, and in all things abide by, do, and perform the judgment of the court in the premises, then the above obligation to be
5 void; otherwise it shall remain in full force and virtue of law.

[SEAL.] WILLIAM DOUGLAS.
[SEAL.] JOHN DOUGLAS.
[SEAL.] COLUMBUS ALEXANDER.

Witness:
JAS. O. CLEPHANE.

In the Supreme Court of the District of Columbia, the 1st day of August, 1864.

Writ.—Issued Aug. 1st, 1864.

WILLIAM DOUGLASS, ADM'OR OF JOHN DOUGLASS, plaintiff,
v.
HENRY DOUGLASS, defendant.
} At law.—No. 150.

The President of the United States to the marshal of said District, greeting:

The plaintiff in this action, having found sufficient sureties to prosecute the same, you ar therefore hereby commanded to take the goods and chattles claimed by the plaintiff, to wit, about 135 japonicas, 4 cape jessamines, and one pittisporum, from the defendant, and deliver the same to the plaintiff, and warn the defendant to appear in said court at the first special term thereof occurring twenty days after service of this writ, and answer said action,
6 and that if he make default in so doing, the plaintiff may proceed to judgment at the trial term of the court next after service of this writ.

R. J. MEIGS, *Clerk.*

Witness:
D. K. CARTTER, *Chief Justice of said Court.*

{ SEAL OF THE SUPREME COURT OF DIST OF COL'A. }

[50-cts. U. S. rev. stamp, cancelled.]

Marshal's endorsement.

AUG. 2, 1864.

Replevied and delivered, as per schedule and transcript, and served copy of summons and declaration on defendant.
August 2nd, 1864.

W. H. LAMON, *Marshal.*

court, for the return of the said property, if the same bead judged by the said court:

Now, the condition of this obligation is such, that if the said Henry Douglas shall and will return the goods and chattels in said
11 declaration mentioned, if the same be adjudged, and in all things stand to, abide by, perform, and fulfil the judgment of the said court, then the above obligation to be void; otherwise to be and remain in full force and virtue in law.

By order of the court.

Witness:

[SEAL.] HENRY DOUGLAS.
[SEAL.] LEWIS JOHNSON.

Proceedings before the Supreme Court of the District of Columbia, holding a special term and Circuit Court for said District, commencing the first Tuesday, 5th of January, 1867.

TUESDAY, *February* 5, 1867.

The court commences the term by proclamation of the marshal, by order of the court. Chief Justice Cartter presiding.

THURSDAY, *April* 4, 1867.

The court resumed its session according to adjournment. Chief Justice Cartter presiding.

12 WILLIAM DOUGLASS, adm'r of John Douglas, pl'ff,
vs.
HENRY DOUGLASS, def't. } 1,150 law. 22 cal.

Come as well the plaintiff, by his attorney, Mr. Cox, as the defendant, by his attorney, Mr. Phillips, and a jury of good and lawful men of this District, to wit, Charles Gessford, Warren Lowe, John Chapman, David Jackson, Thomas Goodrich, John B. Ward, Charles W. Pettit, Roday O'Brian, George H. Grant, Charles H. Anderson, James H. Crane, and Josiah Venable, who, being sworn to try the issue above joined, are respited till the meeting of the court to-morrow.

TUESDAY, *April* 9, 1867.

The court resumes its session according to adjournment. Chief Justice Cartter presiding.

WILLIAM DOUGLASS, adm'r of John Douglass, plaintiff,
v.
HENRY DOUGLASS, defendant. } 1,150 at law. 22 cal.

And now again come here the parties aforesaid, by their at-
13 torneys aforesaid, and the same jury who were respited yesterday; and the said jury having received the instructions of

the court, upon their oath say they find the said issues in favor of the plaintiff, to wit, that the goods and chattels in the declaration mentioned were at the time, &c., the property of the plaintiff, except one Alata, one Mrs. Fetters, one Greville, one William Fourth, one Brittiana, one Sarah Frost, one Seneca, one Duchess of Orleans, and one Sweetiana, which they find to be the property of the defendant, and they assess the plaintiff's damages, by reason of the premises, at one cent, besides costs.

THURSDAY, *April* 11, 1867.

The court resumes its session according to adjournment. Chief Justice Cartter presiding.

Motion for new trial.—Reasons.

WILLIAM DOUGLASS, adm'r of John Douglass, pl'ff,
v.
HENRY DOUGLASS, def't. } 1,150 at law. 22 cal.

The defendant, by his attorneys aforesaid, "moves for a new trial: 1st. Because the verdict of the jury is palpably against the weight of evidence.

2nd. Because the court erred in ruling that the plaintiff,
14 William Douglass, was competent to testify to matters transpiring in the lifetime of his intestate, which matters are set out in the bill of exceptions of the defendant.

3. Because the verdict of the jury was for the plants mentioned in the declaration, whereas there was no evidence offered as to any other Japonica plants than those in the appraisment, one hundred and twenty-two in number, the claim in the declaration, being 135; and whereas for them no evidence whatever was offered as to four Cape Jassamines and a Pittisporum, mentioned in the declaration, and found by the jury to be the property of the plaintiff.

DAVIDGE & PHILLIPS, *for Def't.*

MONDAY, *April* 29, 1867.

The court resumes its session according to adjournment. Chief Justice Cartter presiding.

WILMIAM DOUGLASS, adm'r of John Douglass, pl'ff,
vs.
HENRY DOUGLASS, defendant. } 1,150.—Law. 22 cal.

15 The defendant, by his attorneys aforesaid, comes here now and moves the court that his bill of exceptions to the rulings of the court on the trial, and its directions to the jury, which was filed on the 8th instant, be signed and sealed and made part of the record, and it is done accordingly.

And thereupon the defendant moves the court that judgment on the verdict aforesaid be arrested, for the following reasons:

Motion in arrest of judgment.

1. It was incumbent on the jury to assess the damages in pursuance of the act of February 22, 1867.

2. The verdict, as rendered, is vague and indefinite, so that no judgment can be rendered upon it.

And the court orders that the foregoing motion be, and the same is hereby, allowed without prejudice to the pending motion for a new trial, and both said motions are hereby certified for argument and trial to the court in general term.

Bill of exceptions.—Filed April 11, 1867.

WILLIAM DOUGLAS, adm'r of JOHN Douglas, dec'd
vs.
HENRY DOUGLAS.

At the trial of this cause the pl'ff, to sustain the issues
16 on his part joined, offered evidence tending to prove that certain Japonica plants, mentioned in the appraisment, were the property of his intesate, who died in the year 1852, and that before his death said intestate verbally requested that his personal property should not be divided during the life of his widow, and that said widow died in 1864; that in 1837 said intestate built a green-house in the city of Washington, D. C., at the corner of 15th street west and G street; that for several years before 1837, and subsequently thereto, and until his death, he resided on a square of ground near the boundary of said city, when, in 1837 or 1834, he commenced making collection of the plants in controversy, and that said plants were kept by him at said residence until the building of said green-house, when they were removed to the latter place by the intestate and placed in charge of his son, John Douglass, who, in 1837, commenced to carry on business of a florist and seedsman at said green-house, and continued to carry on said business as the agent of the intestate until his death as aforesaid; that during the summer months said plants were removed to the square aforesaid,
and at the opening of winter carried back to said green-house,
17 and that the intestate, until his death, claimed said plants as his property, and exercised acts of owneship over the same.

On behalf of the defendant evidence was offered tending to prove that the plants in controversy never were the property of the intestate, but were either propagated by the defendant or purchased by him from time to time; that in 1838 the intestate ceased to propogate or purchase such plants, or otherwise add to his collection: that said collection was then and subsequently composed of not more than forty or fifty plants; that in 1838, he established in said business his son, John Douglass, who continued to carry on said business until 1848, when the defendant, also a son of the intestate, bought out the stock in trade and business of his said brother, and has since carried on said business at said green-house; and that the

plants, similar in kind to those in controversy, and placed in the possession of the said John Douglass by the intestate when the business at said green-house was commenced, were either sold by said John Douglass or have long since died.

18 During the trial the pl'ff offered to prove by William Douglass, also a son of the intestate and his administrator, and the pl'ff in this action, that untill the year 1837, he resided with his father on the square aforesaid, and that in said year, and for many ensuing years, he lived in the neighbourhood, about three or four squares off, but frequently visited the said residence of his father, and there saw, from time to time, the plants in controversy in the possession of his father, the intestate; that the said plants were in fact purchased by the intestate when witness was a boy of 12 years of age, and subsequently, and in fact were propegated by said intestate, at his residence in said square; and that the plants so purchased were, in 1837, and subsequently, placed in said green-house, and in the summer seasons taken back to said residence of the intestate, and in the fall of the year, from time to time, returned to said green-house; and that from witness seeing said plants, as aforesaid, he knows them to be the same as those in controversy.

And to the competency of said witness the pl'ff to the record,

19 and a party in interest, to testify to the forgoing facts, or any of them, the defendant objected, which objection was overruled by the court, and said witness allowed to testify to said facts; and to said ruling of the court in favor of said competency this defendant excepts, and prays the court to sign, seal, and cause to be enrolled this his bill of exceptions, which is accordingly done this 8th of April, 1867.

[SEAL.] D. K. CARTTER,
Ch'f Justice.

DOUGLAS
vs. } No. . Law.
DOUGLAS.

In addition to the evidence set out in the bill of exceptions hereby declared part hereof, there was evidence offered by the def't, tending to shew that among the plants replevied there were two of the variety known as Sarah Frost, three Brittiana, two Elate, one Sweetiana, one Douchess of Orleans, one Seneca, one William the 4th, one Grenville, and one Mrs. Fetters, and that said varieties were propegated or purchased by the defendant, and were his property.

20 On the other hand, the pl'ff offered evidence tending to show that the above-named varieties were not among the plants replevied, and the counsel for the plaintiff, in his closing argument to the jury, handed them a written list of said varieties, and disclaimed any title or claim thereto on behalf of the pl'ff.

There was no evidence offered by the pl'ff in relation to any other plants than those contained in the appraisement taken by the marshal and returned to the court and offered in evidence by the pl'ff.

The motion for a new trial having been certified to the court in general term, the foregoing case is moved and certified this 29th of April, 1867.

[L. S.] D. K. CARTTER,
Chief Justice.

Proceedings before the Supreme Court of the District of Columbia, in general term, commencing the first Monday, 6th day of May, in the year of our Lord one thousand eight hundred and sixty-seven.

MONDAY, *May* 6, 1867.

21 The court commenced the term by proclamation by the marshal.

Present, Justices Olin, Fisher, and Wylie.

SATURDAY, *June* 8, 1867.

The court resumes its session according to adjournment. Justices Olin, Fisher, and Wylie presiding.

WILLIAM DOUGLASS, adm'r of John Douglass, plaintiff, *vs.* HENRY DOUGLASS, defendant. } 1150. Law.

And now again come here the parties aforesaid, by their attorneys aforesaid, whereupon the record and proceedings of the Circuit Court and the matters for error assigned by the defendant being seen, and by the court here fully understood, and mature deliberation being thereupon had, because it seems to the court that in said record and proceedings there is no error, therefore, the defendant's said motion for a new trial is overruled; and it is therefore considered that the plaintiffs do recover against the defendant their damages
21 aforesaid, in manner and form aforesaid found, and $ for their costs of suit; and it is further considered by the court that the plaintiff have a return of the plants found by the jury to be the property of said plaintiffs; and it is further considered that said parties have execution accordingly.

O



In the Supreme Court of the United States.

HENRY DOUGLASS, Plaintiff in Error,

vs.

WILIAM DOUGASS, Administrator of John Douglass.

Brief of Plaintiff in Error.

This case comes up to this Court in error to the Supreme Court of the District of Columbia. In the Court below an action of replevin was brought by William Douglass, as administrator of John Douglass against Henry Douglass, to recover certain plants which Henry held in his possession, and which William claimed belonged to the estate of John Douglass.

To prove title to the plants in question William Douglass was himself sworn as a witness, and testified "that, until the year 1837, he resided with his father, the intestate, on square No. 90, in the City of Washington; and that in said year, and for many ensuing years, he lived in the neighborhood, about three or four squares off, but frequently visited the said residence of his father, and there saw, from time to time, the plants in controversy in the possession of his father, the intestate; that the said plants were in part purchased by the intestate when witness was a boy of 12 years of age and subsequently; and in part were propagated by said intestate

at his residence in said square; and that the plants so purchased were, in 1837, and subsequently, placed in a green-house at the corner of 15th and G Streets, and in the summer taken back to said residence of the intestate, and in the fall of the year, from time to time, returned to the said green-house; and that from witness seeing said plants as aforesaid, he knew them to be the same as those in controversy."

The defendant below objected that the plaintiff, who was sueing as the administrator of his intestate, was not competent to prove the facts to which he testified. The Court overruled this objection, and the plaintiff took an exception.

The verdict of the jury will be found, Record, pp. 6 and 7.

The judgment of the Court, R. 10.

Points.

I. The Court below erred in admitting the evidence of the plaintiff in the action.

On the 2d of July, 1864, (13 Stat. at Large, 351,) Congress by law provided "that in *the Courts of the United States* there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to or interested in the issue tried."

On the same day another law was passed providing that thereafter parties to suits in the District of Columbia, and persons interested therein, should not be disqualified on account of interest. (13 Stat. at Large, 374.)

On the 3d of March, 1865, (13 Stat. at L., 533,) Congress declared that the first-mentioned enactment should be amended by adding thereto the following proviso:

"That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by the testator, or intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the Court."

It is submitted that the meaning of this proviso is clear. Congress, by its preceding enactment, swept away the rule of evidence whereby parties to the record or interested in the result were incapacitated to testify. The evil introduced by this sweeping legislation was, that in all transactions in which a party had deceased the survivor was competent to testify, whilst the mouth of his adversary was closed in death. To remedy this evil Congress provided that in all transactions by or against executors or administrators, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator or intestate, thus simply restoring the rule of evidence as it stood before any legislation on the subject.

The language of the proviso is plain and imperative—"neither party"—as to "any transaction with or statements by."

The Court below, in its construction of the proviso of the 3d of March, 1865, adopted the theory that it was only meant to exclude executors and administratars in cases of transactions between them and the deceased, leaving them competent to testify in respect of all the transactions between third parties and the deceased. Such a theory involves the existence of actions unknown to the law, that is, actions instituted by executors and administrators against the estate, or against them by the estate, and hence confines the operation of the law to impossible cases. Now, on the

contrary, it is urged that the proviso establishes or rather restores a plain rule of action—a rule which has existed for centuries—and that the language being free from any ambiguity, a legislative enactment is not to be repealed by speculations.

It may be urged that there was no error inasmuch as the Court, under the proviso, was, in its discretion, authorized to require the witness to testify. But the record shows that such discretion was not exercised, and that the evidence of the witness was admitted as an absolute right of the plaintiff. Undoubtedly the Court might have required the witness to testify, but there is nothing in the record to show that, in the exercise of judicial discretion, it thought proper to do so.

The "*competency of the witness*" was objected to and the exception taken to the ruling of the Court "*in favor of the competency.*" See exception, (Record, p. 9.)

II. The judgment of the Court is not sustained by the verdict of the jury.

1. Because under the act of February 22, 1867, (14 Stat., 405,) it was incumbent on the jury to assess the damages of the plaintiff. The language of the law is that "the plaintiff's damages shall be ascertained by the jury trying the issue when one is joined, or by a jury of inquest where there is no issue of fact."

This amendment was evidently designed for two purposes—one to put an end to useless litigation, but principally, that the jury who tried the issue of the right of property would be by far the best judge of what damages should be awarded against the defendant.

2. "The verdict as rendered is vague and indefinite, so that no judgment can be rendered upon it."

There is no more clearly-settled principle of law than where a verdict is so uncertain that it cannot be executed, nor writ of possession issue under it, it may be set aside on motion in arrest. (12 G. and J., 442.)

The verdict was "that they find for the plaintiff the plants mentioned in the declaration, except one Elata, one Mrs. Fetters, one Greenville, one William 4th, one Britannia, one Sarah Frost, one Seneca, one Duchess of Orleans, and one Sweetiana."

And by the record, containing the evidence, it will appear that the defendant gave evidence tending to show that there were two of the Sarah Frost, three Britannia, two Elata, one Sweetiana, &c., belonging to him, and the plaintiff, on the contrary, that there were no such varieties replevied or claimed by him.

Now, how is it possible for the marshal to execute a writ of *retorno habendo* on such a judgment? Can the Court say that the jury found there were only "one Elata, one Britannia, one Sarah Frost," &c., contrary to the evidence of the defendant, and not rebutted by any evidence of the plaintiff; or that they found one of the two Elatas, and Sarah Frosts, and Britannias to belong to the defendant? Can the Court even say that there were not many others of these respective kinds, or that the description of one Elata, one Britannia, &c., is sufficiently definite to enable the marshal, without injustice to the defendant, who is in no way chargeable with vagueness in the proceedings, to execute its writ?

This case is similar to Dowell *vs.* Richardson, (10 ~~Md.~~ R. J. 573,) when the verdict was held too indefinite to support a judgment.

3. The declaration is so defective in certainty that no judgment can be rendered upon it.

It declares for "*about* one hundred and thirty-five Japonicas."

This is such a defect of substance as is not cured by the verdict.

W. B. WEBB,
For Plaintiff in Error.

In the Supreme Court of the United States.

In Error to the Supreme Court of the District of Columbia.

DECEMBER TERM, 1867.

No. 174.

HENRY DOUGLASS

vs.

WILIAM DOUGASS, ADMINISTRATOR OF JOHN DOUGLASS.

In the Supreme Court of the District of Columbia, on 1st August, 1864, the defendant in error, William Douglass, administrator of John Douglass, his father, issued a writ of replevin against William Douglass, the plaintiff, his brother, and under it took one hundred and twenty-five flowering plants, valued at $4,681, (pp. 3 and 4, Record.) The defendant pleaded property in himself; and 2d, property in Ceylon Snyder. Issue was joined on these pleas, filed his bond under the act of 1785, ch. 80, § 14, and had the property restored to his possession, where it has ever since remained. The case was tried in 1867, and resulted in a verdict for the plaintiff, as follows: The jury "find the issues for and in favor of the plaintiff, to wit, that the goods and chattels in the declaration mentioned were at

the time the property of the plaintiff, *except one Alata, one Mrs. Fetters, one Greville, one William the Fourth, one Britannia, one Sarah Frost, one Seneca, one Duchess of Orleans, and one Sweetiana*, which they find to be the property of the defendant; and they assess the plaintiff's damages, by reason of the premises, at one cent, besides costs."

On the trial of the cause, the defendant excepted to the ruling of the Court, in admitting certain evidence stated in his bill of exceptions, which will be presently noticed. On the 9th April the jury rendered their verdict for the plaintiff, and the defendant filed his motion for a new trial. On the 29th April he filed his motion in arrest of judgment, alleging—1st. That it was incumbent on the jury to assess the damages in pursuance of the act of February 22, 1867. 2d. The verdict, as rendered, is vague and indefinite, so that no judgment can be rendered upon it. And the presiding Judge certified both motions for argument and trial to the Court in general term, (pp. 7 and 8.)

It also appears from the record that, in aid of the motion in arrest, the presiding Judge, without any notice to the opposite party, and after the motion for a new trial, and also that in arrest of judgment had been certified as aforesaid, signed a paper purporting to be a statement of evidence offered by the defendant and plaintiff, respectively, on the trial, but not set out or contained in the bill of exceptions, which paper concludes as follows: "The motion for a new trial having been certified to the Court in general term, the foregoing case is moved and certified this 29th day of April, 1867."

The motion in arrest of judgment and this paper do not appear to have been passed upon by the Court in general term. The record (at p. 10) contains the judgment of the Court: "It seems to the Court that in said record and proceedings there is no error, therefore the *defendant's said motion for a new trial is overruled;* and it is therefore consid-

ered that the plaintiff do recover against the defendant their damages aforesaid," and "have a return," &c.

The defendant in error submits the following points:

FIRST.

I. The motion in arrest of judgment was filed too late, under the rules of that Court. Rule 93, p. 30.

II. But if it had been in time there is nothing in the record which affords any ground for it.

The pleadings are all regular, and the verdict is clear and free from ambiguity on which a judgment could be rendered, and the proper judgment was rendered.

An effort was made to produce a doubt, and ambiguity in the verdict by adding to the record, more than twenty days after the trial, without any notice to the opposite party, a statement of ~~facts~~ of the evidence not contained in the bill of exceptions.

At common law the judge would have had no authority for this; and the statute has not given it to him. See Act March 3, 1863, XII Vol. St., pp. 762, 763, and 764.

On these grounds it is submitted that the motion in arrest of judgment was too late; but if in time it cannot be aided by this addition to the record.

SECOND.

1. But admitting that this paper is part of the record, it shows only that there was contradictory testimony; the defendant below maintaining that he had given evidence to show that more than one of each of the several varieties of plants, named in the verdict, had been taken, and the jury finding there was only one of each; and the plaintiff below insisting that he had given evidence to show that none of those varieties had been replevied, and handing to the jury a list of the said varieties, and disclaiming any title to them; the jury found he had taken one of each.